

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 84 :
 :
 v. : Case No. PERA-C-07-243-W
 :
 PITTSBURGH PARKING AUTHORITY¹ :

PROPOSED DECISION AND ORDER

On June 7, 2007, AFSCME District Council 84 (Union) filed a charge of unfair practices (Charge) with the Pennsylvania Labor Relations Board (Board) alleging that the Pittsburgh Parking Authority (Authority) violated Section 1201(a)(1) & (8) of the Public Employe Relations Act (PERA). In the Charge, the Union specifically alleged that the Authority refused to comply with a grievance arbitration award by improperly calculating the amount of vacation time owed under that award.

On June 28, 2007, the Secretary of the Board (Secretary) issued a Complaint and Notice of Hearing (CNH) directing that a hearing be held on September 25, 2007, in Pittsburgh. By letter dated September 21, 2007, the examiner ordered that the hearing be continued to give the parties an opportunity to enter into factual stipulations in lieu of a hearing. On November 20, 2007, the examiner scheduled a hearing date for February 13, 2008, in Pittsburgh, in response to the Union's November 19, 2007, request for a hearing due to the parties' theretofore inability to agree upon factual stipulations. By letter dated February 13, 2008, the examiner canceled the hearing scheduled for the same date based upon the parties' request that the case be submitted for decision on stipulated facts. The Board received the Stipulation of Facts and supporting exhibits, identified as Attachments 1-7, on February 15, 2008. Both parties timely filed briefs in support of their positions.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The Authority is a public employer within the meaning of Section 301(1) of PERA. (PERA-R-96-123-W).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (Stipulation of Facts ¶ 1).
3. The Union and the Authority were parties to a collective bargaining agreement which was effective from October 1, 2000 through September 30, 2004 (2000 CBA). In September 2004, the Authority notified the Union that three facility maintenance laborers and two clerk typist IIs would become part-time employes effective October 1, 2004. The parties followed the 2000 CBA during negotiations for a successor contract until June 1, 2006. (Stipulation of Facts ¶s 5, 7).
4. The five employes, who were transferred to part-time status on October 1, 2004, were denied full-time benefits as of that date. Under the 2000 CBA, part-time employes do not receive vacation benefits. (Stipulation of Facts ¶ 9).
5. An arbitrator eventually determined that the Authority possessed the managerial prerogative to reduce the five employes from full time to part time. (Stipulation of Facts ¶ 6).
6. The five part-time employes were not paid for any vacation time in 2005. On December 3, 2004, a grievance was filed on behalf of the five part-time employes complaining that they were not paid for vacation time earned at the time of their

¹ The examiner amended the caption to include only the Pittsburgh Parking Authority as the Respondent.

conversion to part-time status. The grievance was pursued to arbitration before Arbitrator John J. Morgan who issued his decision and award on February 23, 2007 (Award). (Stipulation of Facts ¶s 11, 12 & 14).

7. Arbitrator Morgan sustained the grievance and concluded as follows:

As of October 1, 1994, the grievants were paid other accrued benefits, e.g., personal time and comp time because those benefits had been earned. Likewise, however, the grievants had earned vacation benefits. In 2003, the grievants had earned vacation benefits, which they took in 2004. The vacation benefits, which they earned in 2004, could not be taken until 2005. . . .

. . . .

The grievants were part time employees in 2005, and as such they earned no vacation benefits or other benefits in accordance with Article XXI. However, that does not equate with forfeiting the vacation benefit earned during the first nine months of 2004.

(Attachment 6 at 5-6). In his Award, Arbitrator Morgan directed the Authority to "pay the grievants pro rated vacation benefits for nine months of 2004." (Attachment 6 at 5-7).

8. Three of the five employees at issue in the arbitration reached their fifth-year anniversary date in 2005. (Stipulation of Facts ¶ 16).

9. In mid-March, 2007, the Authority paid each of the five grievants 75% of eighty hours (i.e., two weeks) of vacation as a result of the Award. The 75% represents the nine months out of twelve months for 2004 during which the five grievants worked full time. (Stipulation of Facts ¶ 17).

10. Article V of the 2000 CBA provides the following:

Section 1. Each employee shall be entitled to vacation with pay after one (1) year of service from the beginning date of employment and during each subsequent calendar year (January 1 through December 31) thereafter as follows:

YEARS OF <u>COMPLETED</u> SERVICE	CALENDAR WEEKS OF VACATION
One (1) through four (4)	Two (2)
Five (5) through nine (9)	Three (3)
Ten (10) through fourteen (14)	Four (4)
Fifteen (15) or more	Five (5)

(Attachement 1 at 10)(emphasis added). Article V, Section 1 of the 2000 CBA was quoted and relied upon in the Morgan Award. (Attachment 6).

11. The parties' practice with regard to vacation accrual is that full-time employees who are expected to reach their five-year anniversary date in a given calendar year is credited with 120 hours (three work weeks) of vacation as of January 1st of that calendar year, provided that they worked at least 143 hours² in the preceding calendar year and that they work at least one day in the calendar year in which the five-year anniversary date falls. (Stipulation of Facts ¶ 15).

12. Neither party has appealed the Award and the appeal period has expired. (Stipulation of Facts ¶ 19; Attachment 6).

² Although the stipulation provides for "143 hours," there is some indication in the record that the term should be "143 days."

DISCUSSION

The Union argues that the Award requires the three employees who reached their five-year anniversary date in 2005 to be paid pro-rated vacation benefits for the nine months in 2004, but at their 2005 rate of accrual of three weeks, because they would have been five-year full-time employees in 2005, and they could not take their vacation until 2005. The Union specifically contends that "[t]hree of the five grievants were earning vacation during 2004 at the rate of three weeks, or 120 hours, per year, because they were expected to reach their fifth anniversary during 2005." (Union Brief at 8). The Union also relies on a past practice, to which the parties stipulated, providing that "the parties' longstanding practice is that an employee who is expected to reach his or her fifth year of service in a given year is credited with three weeks of vacation as of January 1 of that year provided that he or she worked at least 143 hours in the preceding calendar year, and works at least one day in the calendar year in which the fifth anniversary falls." (Union Brief at 8-9).

Where a complainant alleges a refusal to comply with a grievance arbitration award in violation of Section 1201(a)(1) and (8), the Board and its hearing examiners must determine the following: (1) whether an award exists; (2) whether the appeal period has expired without an appeal from the aggrieved party; and (3) whether the respondent has failed to comply with the arbitrator's decision. City of Philadelphia v. PLRB, 759 A.2d 40 (Pa. Cmwlth. 2000). Here, the parties have stipulated and agreed that there is an Award, that neither party has appealed and that the appeal period has expired. Therefore, the remaining question is whether the Union has met its burden of proving that the Authority has failed to comply with the Award. Determining the answer to that question requires an evaluation of a more specific issue: Whether the Award unambiguously required the Authority to calculate the accrued 2004 vacation time for three of the five employees based on the five-year employee vacation entitlement of three weeks annually where those three employees would not become five-year employees until sometime in 2005. The examiner answers both questions in the negative.

The Board may not review the merits of a grievance arbitration award, when determining compliance. City of Philadelphia, 759 A.2d at 42. However, the Board may reasonably interpret a grievance award to determine whether an employer has complied with it, "[s]o long as [the Board's] interpretation of the arbitrator's award is supported by the record, not violative of constitutional rights, or contrary to law." Wilkins Township Police Department v. PLRB, 707 A.2d 1202, 1204 (Pa. Cmwlth. 1998) (quoting Crawford Central Sch. Dist. v. PLRB, 618 A.2d 1202, 1206 (Pa. Cmwlth. 1992)). Where an employer is charged with a failure to comply with a binding grievance arbitration award, the Board's inquiry is limited to the four corners of the award to determine the intent of the arbitrator as expressed in the award only. AFSCME, Local 1971 v. City of Philadelphia, Office of Housing and Community Development, 24 PPER ¶ 24052 (Final Order, 1993); North Hills Education Ass'n v. North Hills School District, 38 PPER 11 (Proposed Decision and Order, 2007). The Board must not transcend the award. City of Philadelphia, supra. Thus, absent express language to the contrary in the body of the award, a collective bargaining agreement does not complement an award or the reasonable interpretation thereof. East Hempfield Township Police Ass'n v. East Hempfield Township, 38 PPER 118 (Proposed Decision and Order, 2007). "If upon review of the award as a whole the Board is unable to discern the intent of the arbitrator and the award is therefore ambiguous, the Board will dismiss an unfair practice charge alleging non-compliance with the award." AFSCME, Local 1971 v. City of Philadelphia, Office of Housing and Community Development, 24 PPER ¶ 24052 (Final Order, 1993).

Contrary to the Union's argument, the four corners of the entire Award plainly support the Authority's position and not the Union's. Arbitrator Morgan articulated the Union's position during the arbitration in the following manner: "The Union asserts that the grievants are entitled to prorated vacation pay in 2005, a benefit earned during the nine month period in 2004 when they were full time employees." (Attachment 6 at 1). The Union's position, therefore, is that the grievants earned vacation time during the nine months that they were full time in 2004, which they should be able to take in 2005. The question thus becomes whether the grievants earned that vacation time in 2004 at their 2004 rate or at their 2005 rate. Both the Morgan Award, as a whole, and the contractual

provisions incorporated therein dictate that the grievants were not earning vacation time at their projected 2005 rate in 2004. Rather they were earning, in 2004, vacation at their 2004 rate. Arbitrator Morgan framed the issue under consideration as follows: "Whether the Employer violated the collective bargaining agreement when it failed to pay five part time employees a pro-rata share of vacation pay for calendar year 2004." (Attachment 6 at 2). Clearly, the Arbitrator was limiting his consideration of vacation pay owed to the grievants to that which accrued and was earned during the nine months of 2004 that the grievants were full time.

In his analysis, Arbitrator Morgan opined that "[v]acation pay is an earned benefit equivalent to deferred compensation for work performed during the qualifying period. The qualifying period was 2004." (Attachment 6 at 4). Unquestionably Arbitrator Morgan's intent in awarding the five grievant's their vacation for 2004 is that the vacation earned was deferred compensation for work performed during 2004 and therefore at the compensation rate of 2004. The vacation pay considered by Arbitrator Morgan was that which was earned in the past and deferred (i.e., not taken) for future use, as distinguished from vacation time that has yet to be earned at some future accrual rate in 2005. Arbitrator Morgan clearly did not consider the latter which would be akin to giving time to employes that they had not earned and therefore could not have deferred. The past earning and deferral were central to Arbitrator Morgan's analysis. The fact that the time was earned and then banked in a vacation savings account meant that the employees had a property right, via the 2000 CBA, in the earned time placed in their vacation savings account. Vacation time not yet earned and deferred cannot be banked in the vacation savings account and the employe is not entitled to the withdrawal. The Union would allow the grievants to draw more than the amount in their vacation savings account based on projected earnings which would never accrue to the grievant. The grievants, therefore, would be permitted to overdraw the account thereby leaving the Authority to suffer the deficit. Arbitrator Morgan did not intend such a result.

Comparatively, Arbitrator Morgan recognized that the Authority did pay the grievants other accrued benefits, such as personal time and comp time, because those benefits also had been earned. (Attachment 6 at 5). There is no dispute that these other earned benefits were properly paid based on past compensation rates and deferrals and not at rates yet to be earned in a future year. Vacation time cannot, as a matter of law, constitute "deferred compensation," a concept upon which Arbitrator Morgan premises his analysis and conclusion, if it has yet to be earned in a future year at a projected rate. It is deferred because it has already been earned and credited, but not used or realized.

The 2000 CBA requires employes to earn vacation in one year and realize that vacation at the earliest in the year following the year in which it is earned or accrued.³ Article V, Section 1 of the 2000 CBA provides that "[e]ach employee shall be entitled to vacation with pay after one (1) year of service from the beginning date of employment and during each subsequent calendar year (January 1 through December 31) and thereafter." (Attachment 1 at 10). This provision establishes that employes earn and accrue vacation time in one year but they may not use it until the next following year. An employe must complete a year of service before he/she is entitled to use the vacation time earned during that year of service. Arbitrator Morgan relied upon this provision in his decision and Award. The Award and the incorporated 2000 CBA provisions recognize that vacation time is earned in one year and taken in the following year. Also, the vacation time that is earned in the prior year, in this case 2004, is earned at the vacation amount or rate of 2004 or the year in which it is earned. The second part of Article V Section 1, which was also relied upon by Arbitrator Morgan, further makes the point. That part provides as follows:

YEARS OF <u>COMPLETED</u> SERVICE	CALENDAR WEEKS OF VACATION
One (1) through four (4)	Two (2)
Five (5) through nine (9)	Three (3)

. . . .

³ The exception to this requirement is the past practice for five-year full-time employes, infra.

(Attachment 1 at 10)(emphasis added). The clear and unambiguous language in Article V of the 2000 CBA, and the vacation schedule contained therein, unequivocally provides that employees who have "COMPLETED" four years of service are entitled to "Two (2)" calendar weeks of vacation and not three weeks. The three employees at issue in this case did not COMPLETE five years of service; rather they COMPLETED less than four years of full-time service. Arbitrator Morgan quoted this section and relied upon it in issuing his Award. He intended that the Authority calculate the employees' accrued vacation time, earned during calendar year 2004, at the two-week rate not the three-week rate. Accordingly, the Union's argument that "[t]hree of the five grievants were earning vacation during 2004 at the rate of three weeks, or 120 hours, per year, because they were expected to reach their fifth anniversary during 2005," (Union Brief at 8), lacks support in the Award or the record.

Moreover, contrary to the Union's argument, the past practice does not support the conclusion that the "three grievants whose fifth year anniversary date fell in 2005 were earning vacation benefits during 2004 at a rate of three weeks per year." (Union Brief at 9). First, the unfair practice charge alleges a failure to comply with the Award. However, a review of the decision and Award as a whole indicates that Arbitrator Morgan did not rely on this past practice, but he did expressly rely on the above quoted provisions of Article V, Section 1 of the 2000 CBA, which contradicts the Union's position.

Paragraph 15 of the parties' Stipulation of Facts provides as follows:

The parties' practice with regard to vacation accrual is that full-time employees who are expected to reach their five-year anniversary date in a given calendar year is credited with 120 hours (three work weeks) of vacation as of January 1st of that calendar year, provided that they worked at least 143 hours in the preceding calendar year and that they work at least one day in the calendar year in which the five-year anniversary date falls.

(Stipulation of Facts ¶ 15)(emphasis added). This stipulation demonstrates that full-time employees have to begin working in the calendar year during which they expect to reach their fifth year anniversary date before they can expect or vest vacation time at the three-week rate of the fifth year. The past practice is an exception to the contractual provision contained in Article V that requires the accrual of earned vacation time throughout the year, which cannot be taken until the following calendar year. The past practice credits the fifth-year employee with all three weeks at the beginning of the calendar year in which the fifth anniversary date occurs. However, the factual predicate necessary to trigger the past practice does not exist here. The three employees at issue were not full-time employees on January first of 2005 and were not expected to reach their fifth anniversary as full-time employees entitled to vacation benefits in 2005.⁴ Thus, the Award, viewed as a whole, clearly and unambiguously provides that the three employees at issue would have their unpaid 2004 accrued vacation time paid at 75% of two weeks for having completed less than four years of full-time service, and not, as the Union claims, at 75% of three weeks. Accordingly, the Union did not meet its burden of establishing that the Authority failed to comply with the Morgan Award, and the Authority properly paid all the grievants a prorated proportion of two weeks (80 hours) vacation.

⁴ The examiner notes that the conclusion herein (that requiring an employee to be full time on January 1 of the calendar year of the employee's fifth anniversary year and expected to remain so on his/her anniversary date, under the terms of the past practice) is markedly different than Arbitrator Morgan's conclusion that full-time status on January 1, 2005, was not necessary to realize the already earned vacation time from 2004 when the grievants were full-time employees earning vacation time. The past practice requires an employee in his/her fifth anniversary year to be full time during the fifth year during which he/she will earn, accrue and perhaps defer those benefits. Employees, like the three grievants here, who have no expectation of being full time on their fifth-year anniversary date, are not entitled to three weeks on January first of their fifth year, in this case, 2005. Arbitrator Morgan based his decision on a prohibition against forfeiting earned past vacation time. He expressly concluded that future, projected and unearned time, while the employees were not working full time, did not entitle employees to any vacation time. In this regard, Arbitrator Morgan stated that "[t]he grievants were part time employees in 2005, and as such they earned no vacation benefits or other benefits in accordance with Article XXI. However, that does not equate with forfeiting the vacation benefit earned during the first nine months of 2004." (Attachment 6 at 6) (emphasis added).

Therefore, the Authority did not engage in unfair practices in violation of Section 1201(a)(1) or (8) of PERA, and the charge is hereby dismissed.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The Authority is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Authority has not committed unfair labor practices within the meaning of Section 1201(a)(1) or (8) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the Charge is dismissed and the complaint is rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eleventh day of March, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner